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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

WILLIAM PROCTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

On Writs of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *California* v. *Ramos*, this Court made the following holding: "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a *myriad of factors* to determine whether death is the appropriate punishment."

The question presented is whether *Stringer* v. *Black* overruled this holding.

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 2

Argument 3

I

The label "weighing state" is simplistic and should be abandoned 4

A. The tyranny of labels 4

B. Variation in death penalty statutes 6

II

Broad aggravating circumstances are a highly desirable part of individualized sentencing 10

A. *California* v. *Ramos* 10

B. Narrowing: Necessary for rationalization 13

C. Mitigation: Necessary for individualization . . . 14

D. Aggravation: The indispensable flip side 15

E. Reconciling *Stringer* with *Ramos* 18

III

California's system is less prone to discrimination than others previously upheld 21

IV

Striking down California's law now would contribute to the very evil *Furman* was intended to correct 26

Conclusion 29

TABLE OF AUTHORITIES

Cases

Arave v. Creech, 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993) 8, 14

Barclay v. Florida, 463 U. S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983) 7, 17

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 6

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 8, 19, 26

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 19

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 2d 469, 73 S. Ct. 397 (1953) 28

California v. Brown, 479 U. S. 538, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987) 5, 8, 26

California v. Ramos, 463 U. S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983) 3, 8, 9, 10, 12, 26, 27

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993) 28, 29

Coleman v. State, 378 So. 2d 640 (Miss. 1979) 19

Daubert v. Merrell Dow Pharmaceuticals, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) 26

Dawson v. Delaware, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992) 24

Douglas v. Jeannette, 319 U. S. 157, 87 L. Ed. 1324, 63 S. Ct. 877 (1943) 13

Espinoza v. Florida, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992) 7

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346,
92 S. Ct. 2726 (1972) 13, 22, 28

Giarratano v. Procunier, 891 F. 2d 483 (CA4 1989) 16

Godfrey v. Georgia, 446 U. S. 420, 64 L. Ed. 2d 398,
100 S. Ct. 1759 (1980) 3, 5, 10, 11, 16

Graham v. Collins, 122 L. Ed. 2d 260,
113 S. Ct. 892 (1993) 13, 14, 22, 23, 27

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 5, 6, 13

Helvering v. Hallock, 309 U. S. 106, 84 L. Ed. 604,
60 S. Ct. 444 (1940) 29

Johnson v. Texas, 125 L. Ed. 2d 290,
113 S. Ct. 2658 (1993) 9

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
96 S. Ct. 2950 (1976) 6, 10, 11

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 14

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 4, 15, 23, 26

Lowenfield v. Phelps, 484 U. S. 231, 98 L. Ed. 2d 568,
108 S. Ct. 546 (1988) 13

Maynard v. Cartwright, 486 U. S. 356, 100 L. Ed. 2d 372,
108 S. Ct. 1853 (1988) 5, 14, 16

McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262,
107 S. Ct. 1756 (1987) 22

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711,
91 S. Ct. 1454 (1971) 13

Morgan v. Illinois, 119 L. Ed. 2d 492,
112 S. Ct. 2222 (1992) 28

Parker v. Dugger, 498 U. S. 308, 112 L. Ed. 2d 812,
111 S. Ct. 731 (1991) 7

Payne v. Tennessee, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 16, 17

People v. Brown, 40 Cal. 3d 512, 220 Cal. Rptr. 637,
709 P. 2d 440 (1985) 2, 5, 8, 27

People v. Cox, 53 Cal. 3d 618, 280 Cal. Rptr. 692,
809 P. 2d 351 (1991) 19

People v. Proctor, 4 Cal. 4th 499, 15 Cal. Rptr. 2d 340,
842 P. 2d 1100 (1992) 2

People v. Sandoval, 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342,
841 P. 2d 862 (1992) 9

People v. Superior Court (Engert), 31 Cal. 3d 797,
183 Cal. Rptr. 800, 647 P. 2d 76 (1982) 11

People v. Tuilaepa, 4 Cal. 4th 569, 15 Cal. Rptr. 2d 382,
842 P. 2d 1142 (1992) 2

Planned Parenthood of Southeastern Pennsylvania v. Casey,
120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) 28

Proffitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913,
96 S. Ct. 2960 (1976) 23

Pulley v. Harris, 465 U. S. 37, 79 L. Ed. 2d 29,
104 S. Ct. 871 (1984) 5, 8, 21, 26

Richmond v. Lewis, 121 L. Ed. 2d 411,
113 S. Ct. 528 (1992) 4, 8

Rockwell v. Superior Court, 18 Cal. 3d 420,
134 Cal. Rptr. 650, 556 P. 2d 1101 (1976) 22

Sawyer v. Whitley, 120 L. Ed. 2d 269,
112 S. Ct. 2514 (1992) 15

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674,
54 S. Ct. 330 (1934) 4

Sochor v. Florida, 119 L. Ed. 2d 326,
112 S. Ct. 2114 (1992) 7

Songer v. State, 365 So. 2d 696 (Fla. 1978) 27

Stringer v. Black, 117 L. Ed. 2d 367,
112 S. Ct. 1130 (1992) 3, 7, 12, 17, 18, 20, 28

Sumner v. Shuman, 483 U. S. 66, 97 L. Ed. 2d 56,
107 S. Ct. 2716 (1987) 5, 27

United States v. Boney, 977 F. 2d 624 (CA DC 1992) . . . 24

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511,
110 S. Ct. 3047 (1990) 8, 13

Webster v. Fall, 266 U. S. 507, 69 L. Ed. 411,
45 S. Ct. 148 (1925) 8

Woodson v. North Carolina, 428 U. S. 280,
49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 14, 15

Zant v. Stephens, 462 U. S. 862, 77 L. Ed. 2d 235,
103 S. Ct. 2733 (1983) . . . . . Passim

State Statutes

Cal. Penal Code § 189 . . . . . 10, 21

Cal. Penal Code § 190.2 . . . . . 10, 21

Cal. Penal Code § 190.3 . . . . . 8, 9, 19, 24, 26

Miss. Code Ann. § 99-19-101 (Supp. 1993) 19

Federal Rule

Federal Rules of Evidence, Rule 404(a)(1) 25

Miscellaneous

California Jury Instructions, Criminal
(5th ed., Supp. 1994) 8, 19

Klein & Rolph, Relationship of Offender and Victim Race to
Death Penalty Sentences in California,
32 Jurimetrics J. 33 (1991) 25, 26

Maitland & Montague, A Sketch of English Legal History
(Colby ed. 1915) 15

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Shocker on Habeas Retroactivity,
28 Crim. L. Bull. 521 (1992) 28

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Capital Punishment 1991 27

J. Wilson, Thinking About Crime (1976) 15

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit corporation formed to advance the interests of victims of crime and the law-abiding public in the criminal justice system. Defendants' efforts to overturn the use of aggravating factors that have been used for 17 years in California is contrary to the interests CJLF was formed to protect.

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1. All parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

In April of 1982, defendant Proctor tortured, raped, and murdered Bonita Stendall, a 55-year-old, widowed first grade teacher. Proctor J. A. 96. At his second penalty trial the next year, the jury was instructed to base its verdict on whether the aggravating circumstances "outweigh" any mitigating. *Id.*, at 79. Included in the aggravating circumstances were the circumstances of the crime (to the extent they are aggravating), prior violent crimes, and prior conviction of felonies. *Id.*, at 77.

In October of 1986, defendant Tuilaepa entered a bar during Monday night football. He robbed the bartender, robbed the patrons, shot and killed patron Melvin Whiddon, and shot and wounded three other patrons. Tuilaepa fired the last shot while exiting the bar and smiled before shooting. Tuilaepa J. A. 69-71.

Because Tuilaepa's case was tried after *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), his jury received a different instruction from that given Proctor's jury. "In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Tuilaepa J. A. 63. The jury was instructed, as in *Proctor*, to consider circumstances of the crime, prior violent crimes, and prior felony convictions. *Id.*, at 60-61.

Both defendants were sentenced to death, and both sentences were upheld. *People* v. *Proctor*, 4 Cal. 4th 499, 842 P. 2d 1100 (1992); *People* v. *Tuilaepa*, 4 Cal. 4th 569, 842 P. 2d 1142 (1992).

SUMMARY OF ARGUMENT

This case should not be decided on the simplistic basis of whether California is or was a "weighing state." Instead, the California system and the manner in which it considers aggravating circumstances must be examined on an individual basis.

Over many years and many cases, this Court has repeatedly distinguished between the circumstances used to narrow the death-eligible class and those used to select the proper sentence for defendants within that class. The eligibility factors must provide clear and objective guidance. However, in *California* v. *Ramos* this Court held, while considering the very statute at issue here, that consideration of "a myriad of factors" in the final selection phase was not only permissible but desirable, and that a lack of concrete guidance "presents no constitutional problem."

The problem of racial prejudice provides no ground to strike down the California system. California's middle-of-the-road approach to aggravating circumstances is at least equal to, if not superior to, other approved approaches.

California's system has survived 17 years of the most intense litigation in history, including four reviews by this Court. To strike it down now "would be nothing less than a breach of faith."

ARGUMENT

In *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983), this Court drew a sharp distinction between circumstances used to narrow the death-eligible class and those used "in the process of selecting, from among that class, those defendants who will actually be sentenced to death." While the specificity requirement of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) applies to the eligibility circumstances, "the Constitution does *not* require the jury to ignore other possible aggravating factors" in the selection step. *Stephens*, 462 U. S., at 878 (emphasis added).

In *California* v. *Ramos*, 463 U. S. 992, 1008 (1983), this Court emphatically repeated this distinction, quoted the *Stephens* principle, and applied it to the very statute at issue in the present case. Defendants' position that the *Godfrey* standard of specificity applies to California's selection circumstances cannot be reconciled with *Ramos*. Their position, then, boils down to a contention that *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992) overruled *Ramos*, even while denying it was creating or applying any new rules. That cannot be correct.

I. The label "weighing state" is simplistic and should be abandoned.

A. The Tyranny of Labels.

"A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). Justice Cardozo's wise admonition rings especially true in the present case.

In the past few years, this Court's opinions in this area have scrutinized the standard by which the sentencer makes the final decision, to determine whether the sentencer "weighs." See, *e.g.*, *Richmond* v. *Lewis*, 121 L. Ed. 2d 411, 421, 113 S. Ct. 528, 534-535 (1992). This distinction, *amicus* submits, is a mirage. The unvarnished truth is that *all* sentencers "weigh."

The *Richmond* Court, analyzing the standard used for the final sentencing decision in Arizona, said this. "Read most naturally, [the statute] requires the sentencer to weigh aggravating and mitigating circumstances—to determine the relative 'substan[ce]' of the two kinds of factors." *Id.*, 121 L. Ed. 2d, at 421, 113 S. Ct., at 535. That is quite true, but is it any less true of the instruction in *Zant* v. *Stephens*?

Stephens' jury was instructed that it "shall consider any mitigating circumstances or aggravating circumstances authorized by law."[2] How can jurors comply with this instruction without "weighing" the aggravating and mitigating against each other? Mitigating circumstances, by definition, are those proffered as a basis for a sentence less than death. See, *e.g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). Aggravating circumstances are necessarily the opposite. A decision process which considers them both necessarily involves a consideration of their relative moral force, *i.e.* "weighing."

The *Stephens* Court implicitly recognizes that Georgia juries *do* "weigh." In the course of rejecting the argument that a vague eligibility factor had poisoned the sentencing decision, the *Stephens* Court says "That label [statutory aggravating circumstance] arguably might have caused the jury to give somewhat greater *weight* to respondent's prior criminal record than it

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2. The full instruction is reproduced in the Appendix.

otherwise would have given." *Zant* v. *Stephens*, *supra*, 462 U. S., at 888 (emphasis added); see also *id.*, at 880 (referring to Georgia jury's "weighing").

People v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987), explained the nature of the decision process under California law.

> "[T]he word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. . . . Thus the jury, by weighing the various factors, *simply determines under the relevant evidence which penalty is appropriate in the particular case.*" *Ibid.* (emphasis added).

Only by straining logic to the breaking point could one contend that there is a difference of constitutional magnitude between a direction to "weigh" aggravating and mitigating circumstances, as that term is used in *Brown*, and a direction to "consider" aggravating and mitigating circumstances such as the one in *Zant* v. *Stephens*. There are differences between the various states' sentencing systems, to be sure, but the difference does not lie in a distinction between "weigh" and "consider." So long as the sentencer has discretion and considers mitigating factors, which the Eighth Amendment has been construed to require, see *Sumner* v. *Shuman*, 483 U. S. 66, 73-76 (1987) (summarizing cases), *all sentencers "weigh."*

In the past, this Court has resisted the temptation to oversimplify and overclassify death penalty statutes. "We take statutes as we find them . . . . '[E]ach distinct system must be examined on an individual basis.' " *Pulley* v. *Harris*, 465 U. S. 37, 45 (1984), quoting *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976). It would be a fundamental error, *amicus* submits, to simply decide whether California is to be labelled a "weighing state" and then mechanically apply the standard of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) to California's "aggravating" circumstances as a

result of that labelling. Instead, California's system must be "examined on an individual basis" to determine the proper rule.

B. Variation in Death Penalty Statutes.

There is considerable variation in state capital sentencing systems. They do not neatly fit into two pigeonholes labelled "weighing" and "nonweighing." To illustrate, we will look briefly at the four states with the largest numbers of capital cases: Texas, Georgia, Florida, and California.

The Texas system has a narrowed definition of capital murder. Aggravating and mitigating circumstances are considered indirectly as they relate to the statutory "special issues" of deliberation and future dangerousness. *Jurek* v. *Texas*, 428 U. S. 262, 272-273 (1976) (lead opinion). The future dangerousness inquiry is a broad one, sweeping in a wide variety of information about the defendant. *Ibid.* *Jurek* upheld the system against a vagueness attack on future dangerousness, *id.*, at 275-276, and this Court reaffirmed the validity of the broad inquiry in *Barefoot* v. *Estelle*, 463 U. S. 880, 896-897 (1983).

The Georgia system narrows the death-eligible class with statutory aggravating circumstances, one of which must be found true by the jury. From that point on, however, the jury is not limited to the statutory list and may consider *any* circumstances in aggravation or mitigation. *Zant* v. *Stephens*, *supra*, 462 U. S., at 871. However, the jury is explicitly instructed to consider the statutory aggravating circumstances, along with any others it deems relevant, in arriving at the final determination. See Appendix. The jury is told to "consider" aggravating and mitigating circumstances, but is not told to "weigh" them. *Ibid.*

Stephens and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) held that the jury's consideration of unlimited aggravating circumstances at this final decision stage is not merely permissible, it is preferable. "We think the Georgia court *wisely* has chosen not to impose *unnecessary* restrictions . . . ." *Stephens*, *supra*, 462 U. S., at 886, quoting *Gregg* (emphasis added).

This expansion of aggravating factors *in* the final sentencing decision, beyond those considered for eligibility, was the basis of *Zant* v. *Stephens*. The fact that Stephens' jury should not have been instructed on his criminal record as an eligibility

circumstance did not render erroneous their consideration of that record in the final sentencing decision. 462 U. S., at 888.

In Florida, as in Georgia, the death-eligible class is narrowed by the requirement that at least one in a list of aggravating circumstances must be found true. *Barclay* v. *Florida*, 463 U. S. 939, 954 (1983) (plurality). Unlike Georgia, however, the prosecution's case for a sentence of death is limited to that *same* list of factors. *Ibid.* The jury is instructed to "weigh" the aggravating against any mitigating. *Id.*, at 953.

This structure creates a linkage between the eligibility findings and the final sentencing decision. A factor not found for eligibility does not belong on "death's side of the scale." See *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992) (discussing similar Mississippi system, see *post*, at 18). A factor erroneously found for eligibility is thus wrongly on "death's side of the scale." This is different from Georgia, where an eligibility factor which is erroneous only for vagueness is nonetheless properly considered in the last step.

Where multiple eligibility factors are found true, an error in only one is necessarily harmless error as to eligibility. However, in Florida-type systems, that same error may result in a factor being considered in the balance that should not have been there. That damage can be repaired only by a determination that the error was harmless or by a new "weighing." *Ibid.* When the *Stephens* Court noted that its holding would not necessarily apply in all states, it cited three states, all of which limit aggravation in the final selection stage to the same circumstances used for eligibility. See *Stephens*, *supra*, 462 U. S., at 873-874, n. 12, and statutes there cited.

All of this Court's recent opinions on vague "aggravating" circumstances have involved Florida-type systems. That is, the sentencer must explicitly find at least one circumstance in the statutory list true for the defendant to be *eligible* for the death penalty. Furthermore, in each case the aggravating side of the "weighing" process has been limited by state law to the eligibility circumstances found true. *Parker* v. *Dugger*, 498 U. S. 308 (1991) (Florida); *Stringer*, *supra*; *Sochor* v. *Florida*, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); *Espinoza* v. *Florida*, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992); *Richmond* v. *Lewis*,

121 L. Ed. 2d 411, 113 S. Ct. 528 (1992) (Arizona); see *Walton* v. *Arizona*, 497 U. S. 639, 643-644 (1990) (describing Arizona system). In each of these cases, there was *Godfrey* error because an *eligibility* circumstance was vague. With the possible exception of *Stringer*, discussed further below, these cases dealt only with the question of when *Godfrey* error is harmless, and not with any independent specificity requirement in the selection stage.

Arave v. *Creech* 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993) did not deal with the selection stage at all, because Idaho chose to take its stand on the position that its factor was valid for eligibility under *Godfrey*. See *id.*, 123 L. Ed. 2d, at 197, 113 S. Ct., at 1540 (certiorari granted, limited to "narrow question"). Defendant Proctor's attempt to infer a holding from the presence of additional factors in *Creech*, Brief for Petitioner 15, is incorrect. Cases are not authority for propositions not considered. See *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

California's law has gone through three phases. There is the 1977 statute upheld in *Pulley* v. *Harris*, *supra*; the 1978 initiative as literally written, considered in *California* v. *Ramos*, 463 U. S. 992 (1983) and *Boyde* v. *California*, 494 U. S. 370 (1990); and the statute as judicially modified in *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987). See *Boyde*, 494 U. S., at 374-375, n. 3 (summarizing change made by *Brown*).

The 1977 law directed the jury to "take into account and be guided by the aggravating and mitigating circumstances," but did not use the word "weigh." See *Harris*, *supra*, 465 U. S., at 52. The 1978 statute, as written, requires the jury to "weigh" and to sentence the defendant to death if the aggravating outweighs the mitigating. Cal. Penal Code § 190.3; Proctor J. A. 79. However, to avoid the perceived constitutional problem ultimately dismissed in *Boyde*, the California Supreme Court construed this feature out of the statute in *Brown*, *supra*, 40 Cal. 3d, at 539-541, 709 P. 2d., at 454-456. Juries are now instructed to consider the circumstances and determine the appropriate penalty. California Jury Instructions, Criminal § 8.88 (5th ed., Supp. 1994); Tuilaepa J. A. 63.

Throughout this evolution, though, the California system has had a feature that makes it different from either the Georgia or Florida systems. There are two *different* lists of aggravating circumstances. For narrowing the death-eligible class, the jury must find a "special" circumstance. For the final sentencing decision, the jury may consider in aggravation not only the special circumstances previously found but also any circumstances of the offense deemed aggravating, any prior felonies, and any prior crimes of violence. Cal. Penal Code § 190.3(a), (b) and (c).[3] In other words, the only relevant items of aggravating evidence excluded are nonviolent misdemeanors and general, noncriminal "bad character" evidence. As in Georgia, this breadth of aggravating circumstances is not only permissible, it is preferable. See *California* v. *Ramos*, 463 U. S. 992, 1008 and n. 22 (1983).

In summary, then, California's system is not entirely like Georgia's, Florida's, or Texas's. Like Texas, and unlike Georgia and Florida, eligibility for capital punishment is determined by findings in the guilt phase and not in the penalty phase. Like Georgia, and unlike Florida, the penalty decision is open on the aggravating side to broad factors, and not limited to a few specific factors. However, like Florida and Texas, and unlike Georgia, the jury is not given a completely free rein to consider any factors it wants.

This variety in statutes defies simplistic pigeonholing as "weighing" or "nonweighing." It is time, *amicus* submits, to abandon the simplistic approach and return to the original wisdom of examining each system individually.

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3. The statute also lists "age" which, where it is applicable, is usually a mitigating factor. See, *e.g.*, *Johnson* v. *Texas*, 125 L. Ed. 2d 290, 311-312, 113 S. Ct. 2658, 2673 (1993) (O'Connor, J., dissenting). While it is possible for age to be aggravating, see *ibid.*; *People* v. *Sandoval*, 4 Cal. 4th 155, 189, 841 P. 2d 862, 880 (1992), cert. granted limited to other grounds *Sandoval* v. *California*, No. 92-9049 (Sept. 28, 1993), these cases do not present that issue. The prosecutor in *Proctor* explicitly told the jury that age was mitigating, Proctor J. A. 27-28, while the prosecutor in *Tuilaepa* merely argued that under the circumstances of the case age was not mitigating. Tuilaepa J. A. 11-14.

II. Broad aggravating circumstances are a highly desirable part of individualized sentencing.

Defendant Tuilaepa maintains that "In the years since *Godfrey*, the Court has never suggested that the approach used in *Godfrey* to evaluate the propriety of aggravating factors is somehow limited to schemes which, like Georgia, limit the use of aggravating factors to determining whether a defendant is eligible for the death penalty." Brief for Petitioner Tuilaepa 13. If counsel for Tuilaepa means this statement to imply that this Court has never limited *Godfrey* to eligibility circumstances, then he is quite wrong. This Court has recognized such a distinction repeatedly. One of these cases dealt with the very statute at issue in the present case.

A. California v. Ramos.

California v. *Ramos*, 463 U. S. 992 (1983) involved a paragraph of California Penal Code section 190.3 known as the "Briggs Instruction," which required that the jury be informed of the possibility of commutation of life-without-parole sentence. The California Supreme Court had held in its decision in *Ramos* that the instruction invites the jury "to *consider* the commutation power in its sentencing determination," and this Court proceeded with its analysis on that basis. *Id.*, at 998, n. 8 (emphasis in original). This Court then rejected Ramos's vagueness attack on the future dangerousness determination inherent in this consideration.

The *Ramos* Court's rejection of this attack was based in part on a comparison of California's system with the one approved in *Jurek* v. *Texas*, 428 U. S. 262 (1976). *Ramos*, *supra*, 463 U. S., at 1001-1002. In Texas, as in California, there is a clear separation between the death-eligibility criteria and the factors used for selection from the eligible class. *Id.*, at 1000, n. 11, 1002. The Texas offense of "capital murder" corresponds to the California verdict of murder in the first degree with special circumstances. Compare *Jurek*, *supra*, 428 U. S., at 268 with Cal. Penal Code §§ 189, 190.2.

If "future dangerousness" were subjected to the *Godfrey* test of specificity, it would surely fail. Just as virtually all murders are "vile," cf. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429

(1980) (plurality), so virtually all murderers are "dangerous." Vileness and dangerousness are both relative terms as applied to murders and murderers, respectively. When the jury makes one of these determinations, it is not finding a fact to be objectively true or false; it is placing the crime or the criminal on a continuum, relative to other crimes and criminals. In *Godfrey*, the lack of any objective milestones on this continuum was a constitutional defect, lacking any "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U. S., at 433; see also *People* v. *Superior Court* (*Engert*), 31 Cal. 3d 797, 806, 647 P. 2d 76, 81 (1982). In *Jurek*, the lack of objective milestones on the continuum of dangerousness was not a defect, and the Court explicitly rejected the vagueness challenge. 428 U. S., at 274-276. The difference is that *Godfrey* involves an eligibility criterion and *Jurek* and *Ramos* do not.

Ramos does not end with the *Jurek* discussion, however. The *Ramos* Court goes on to discuss the nature of the sentencing decision, relying heavily and explicitly on *Zant* v. *Stephens*, 462 U. S. 862 (1983):

> "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted.[21] *Once the jury finds that the defendant* falls within the legislatively defined category of persons *eligible* for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, *the jury then is free to consider a myriad of factors* to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. 'But *the Constitution does not require the jury to ignore other possible . . . factors* in the process of selecting . . . those defendants who will actually be sentenced to death.' *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra* at 1003. This element '*is simply one of the countless consider-*

ations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.' 462 U.S., at 900 (Rehnquist, J., concurring in the judgment).[22]

"[21] '[S]entencing decisions rest on a far-reaching inquiry into *countless facts and circumstances* and not on the type of proof of particular elements that returning a conviction does.' *Zant* v. *Stephens*, 462 U.S., at 902 (Rehnquist, J., concurring in judgment).

"[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to weigh aggravating factors against mitigating factors and impose death only if the former outweigh the latter. *The desirability of the defendant's release into society is simply one matter that enters into the weighing process*. Moreover, the fact that the jury is given *no specific guidance* on how the commutation factor is to figure into its determination *presents no constitutional problem*. As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' *Id.*, at 875." *Ramos*, *supra*, 463 U. S., at 1008 (emphasis added).

Thus, this Court has quite explicitly held that the sentence selection process of California Penal Code section 190.3 is *not* governed by the same strict specificity requirements as the death eligibility determination. Moreover, as footnote 22 makes clear, the *Ramos* Court did so while very much aware that section 190.3 as written and as then construed called for a "weighing" process and that the factor before the Court was "one matter that enters into the weighing process."

After *Ramos* and before *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992), *amicus* would have considered this point so thoroughly established that it would only require a bare citation, not a major section of a brief. Regrettably, some language in the *Stringer* opinion has muddied the previously clear waters to the point that an unequivocal reassertion of the

Ramos principle is necessary. To show why *Ramos* was right, we go back to the beginning.

B. Narrowing: Necessary for Rationalization.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down the existing system of unfettered discretion in capital sentencing, effectively overruling the clear holding of *McGautha* v. *California*, 402 U. S. 183, 207 (1971). In sharp contrast to Justice Harlan's careful, thorough, scholarly opinion for a solid majority in *McGautha*, none of the five Justices voting to reverse in *Furman* joined any of the others' opinions. Cf. *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the judgment) (duty to explain basis).

Notwithstanding this fracture, it is clear enough what motivated a majority of the Court to make the dramatic about-face that it did. Pre-*Furman* death penalty law provided far too much leeway for racial discrimination. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 277-280, 113 S. Ct. 892, 904-906 (1993) (Thomas, J., concurring); *id.*, 122 L. Ed. 2d, at 292, 113 S. Ct., at 915 (Stevens, J., dissenting).

The evil exposed in *Furman* was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders. See *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting); *Gregg* v. *Georgia*, 428 U. S. 153, 206-207 (1976) (lead opinion). To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

For the most part, the identification of factors which separate the death-eligible defendants from the others is a matter for legislative and not judicial decision. See *Gregg*, *supra*, 428 U. S., at 192. The one major limitation on eligibility factors is tightly bound to the purpose of those factors. That is, "aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis* v. *Jeffers*, 497

U. S. 764, 776 (1990). The *Jeffers* Court left no ambiguity concerning what it meant by "aggravating circumstances"—"those circumstances that make a criminal defendant '*eligible*' for the death penalty . . . ." *Id.*, at 774 (emphasis added); see also *Graham* v. *Collins*, 122 L. Ed. 2d 260, 300, 113 S. Ct. 892, 922 (1993) (Souter, J., dissenting) ("specific and detailed guidance" requirement is for eligibility); *Stephens*, *supra*, 462 U. S., at 886.

Because eligibility turns on a "yes or no" answer to a question, that question must be one which is susceptible to such an answer. Because all murders are heinous, asking a jury whether the murder is "especially heinous" fails to provide a principled distinction. See *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988). For eligibility circumstances to work properly, the jury must be asked to find a fact true or false, and not simply to place the crime on an unmarked continuum of heinousness, with no clue as to where the line is drawn between "especially heinous" and "ordinarily heinous."

Narrowing the eligible class requires a factual determination, but the fact need not be externally visible or mathematically precise. The defendant's state of mind can be a valid eligibility circumstance, since state of mind is a factual determination, albeit a difficult one. *Arave* v. *Creech*, 123 L. Ed. 2d 188, 199, 113 S. Ct. 1534, 1541-1542 (1993).

C. Mitigation: Necessary for Individualization.

The most obvious answer to the *Furman* problem of arbitrariness and discrimination would appear to be mandatory sentencing. However, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) struck down mandatory sentencing. The *Woodson* plurality gave three reasons for this holding: collective legislative judgment, *id.*, at 298-299, the inevitable widespread nullification of a sweeping, mandatory death penalty for first-degree murder, *id.*, at 291-296, and a newly created constitutional imperative of individualized sentencing, *id.*, at 303-305.

The nullification point is far and away the strongest support for the *Woodson* rule. If the system has no formal outlet for the extension of mercy in appropriate cases, the operators of the system will find informal ways. This went on for centuries in

England, from the faking of reading tests for "benefit of clergy," see Maitland & Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to bogus insanity verdicts, which dropped sharply upon the abolition of capital punishment, see J. Wilson, Thinking About Crime 187 (1976). Justice and equality are better served by keeping the inevitable mercy decision out in the open and permitting the state to structure it. *Woodson*, *supra*, 428 U. S., at 303.

The final choice between life imprisonment and death is fundamentally different from the eligibility determination. See *Ramos* quote, *ante*, at 11-12; *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 282, 112 S. Ct. 2514, 2520-2521 (1992). While the Constitution requires the eligibility determination to be based on legislatively specified facts, the Constitution has been construed to require that the sentencer be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

There are two possible justifications for the *Lockett* rule. One is a naked desire to reduce the number of death verdicts. It is self-evident that this reason is illegitimate, and if *Lockett* rested on this reason, *Lockett* would be illegitimate.

A second reason for the rule is a conviction that the complexities of human behavior preclude any attempt to list the factors that ought to inform the final sentencing decision. This is the rationale the *Lockett* plurality gives for its rule. Full information and a wide range of factors increase the accuracy of sentencing. *Id.*, at 602-603.

D. Aggravation: The Indispensable Flip Side.

If the final stage of capital sentencing is truly to be individualized, mitigating circumstances cannot be considered in a vacuum. Whether the factors proffered in mitigation *really do* "call for a less severe penalty," see *id.*, at 605, necessarily depends on the relevant factors in aggravation.

A hypothetical will illustrate. A and B are both convicted of rape and murder, a death-eligible offense. They are equally culpable of the crime. They both offer the same mitigation:

they were drunk. Both have criminal records, so neither can claim lack of a record as mitigation. A's record, however, is a single prior conviction of unarmed robbery, while B has committed numerous previous rapes, including exceptionally brutal and sadistic acts.

Prior conviction of a violent felony less than murder is generally not an eligibility circumstance. Indeed, in *Zant* v. *Stephens* the state court had previously stricken a similar circumstance as unconstitutionally vague. 462 U. S., at 867. Yet if their criminal records cannot be considered as aggravating, the sentencing profiles of A and B are badly skewed. They appear to be equally deserving of the death penalty, when in fact B is vastly more deserving.

For mitigating evidence to perform its accuracy-enhancing function, it must be presented and considered in the context of aggravating evidence. Mitigation without aggravation makes no more sense than peaks without valleys. Just as accuracy is enhanced by consideration of all relevant mitigating factors, so it is enhanced by consideration of all relevant aggravating factors.

Time and again, this Court has reiterated the legitimacy of broad aggravating circumstances in cases where the jury is instructed to "weigh." In *Ramos*, quoted *ante*, at 11-12, the factor of future dangerousness was upheld. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 736, 111 S. Ct. 2597, 2609 (1991) permits consideration of the impact on the victim.

Both *Ramos* and *Payne* upheld, under statutes which instruct juries to "weigh," the consideration of aggravating factors which would fail the test of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). These latter cases struck down the *eligibility* factors "outrageously or wantonly vile" and "especially heinous," because every murder is vile and heinous, and the additional adverbs provide no meaningful place to draw the line. See *Maynard*, 486 U. S., at 364.

By the same logic, "future dangerousness" would fail as an eligibility circumstance, because virtually all murderers will be dangerous, although some will be more so than others. See *ante*, at 10-11. In *Giarratano* v. *Procunier*, 891 F. 2d 483, 489-

490 (1989), for example, the Fourth Circuit rejected a vagueness attack on Virginia's use of "future dangerousness" only because the required narrowing had been done at an earlier stage of the proceedings. Yet *Ramos* expressly upheld future dangerousness as a "weighing" circumstance. See *ante*, at 12.

Victim impact would similarly fail *Godfrey*/*Maynard*. All murders have victims and virtually all victims leave survivors. See *Payne*, *supra*, 115 L. Ed. 2d, at 744, 111 S. Ct., at 2615 (Souter, J., concurring). The prosecutor in *Payne* argued that victim impact was relevant to the "especially heinous" factor in the sentencing phase, see *id.*, 115 L. Ed. 2d, at 729, 111 S. Ct., at 2603, but an eligibility finding under this circumstance based on victim impact alone would unquestionably be insufficient. Thus *Payne* upholds a "weighing" circumstance which is broader and more diffuse than would be allowed for an eligibility circumstance.

In *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983), the trial judge considered Barclay's criminal record as an aggravating circumstance, even though Florida law does not permit this. Part II B of the plurality opinion addresses the question of whether Florida law could constitutionally have permitted his criminal record to be considered. It holds simply that the principle of broad aggravating circumstances set forth in *Zant* v. *Stephens* applies equally to Florida. *Barclay*, 463 U. S., at 956.[4] "Criminal record" is a valid sentencing criterion, even though it is too vague to be a valid eligibility circumstance. Cf. *Stephens*, 462 U. S., at 867-868. The *Barclay* concurrence, by the author of *Stephens*, is in complete accord on this point. *Barclay*, 463 U. S., at 966-967, 969-970 (Stevens, J., concurring in the judgment).

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4. The "harmless error" portion of *Barclay* noted in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992), which is part II C of the *Barclay* opinion, refers only to the claim that the state court was "lawless" in its application of harmless error analysis to the *state law* error. See *Barclay*, 463 U. S., at 957-958. On the federal level, there simply was no error. The *Stringer* majority opinion glosses over this vitally important distinction. The dissent recognizes it. *Stringer*, 117 L. Ed. 2d, at 389, 112 S. Ct., at 1144-1145 (opinion of Souter, J.).

As of 1991, then, the law was settled beyond question. Once the eligibility hurdle is cleared, the Constitution does not limit sentencers to consideration of aggravating factors which meet the specificity requirement of *Godfrey/Maynard*. This principle applies to all state systems, whether they instruct juries to "weigh," as in *Ramos*, *Payne*, and *Barclay*, or whether they do not, as in *Zant* v. *Stephens*.

E. Reconciling Stringer with Ramos.

The single flaw in this otherwise clear crystal is a single, citeless sentence in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 382, 112 S. Ct. 1130, 1139 (1992): "A vague aggravating factor used in the weighing process is in a sense worse [than a vague eligibility factor], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

The main issue in *Stringer* was whether Mississippi's "aggravating" circumstances are subject to the specificity requirement of *Godfrey*. The circumstances function the same way as Florida's, *i.e.*, at least one must be found true, and those found true are the only ones "weighed" in aggravation. *Id.*, 117 L. Ed. 2d, at 378, 112 S. Ct., at 1136. The state argued that *Godfrey* did not apply because the required "narrowing" had been done in the guilt phase. This Court rejected that argument on the basis of Mississippi Supreme Court precedent. *Id.*, 117 L. Ed. 2d, at 380-381, 112 S. Ct., at 1137-1139.

Godfrey thus applies to the factors a state uses to establish the last "plane" dividing death-eligible from death-ineligible cases, cf. *Stephens*, *supra*, 462 U. S., at 871, regardless of whether earlier divisions would be constitutionally sufficient. This holding was sufficient to resolve the case before the Court, and the *Stringer* opinion could have stopped there. However, *Stringer* goes on to make the statement quoted above.

If the quoted sentence would overrule the "myriad of factors" holding of *Ramos*, see *ante*, at 11-12, then *Stringer* improperly created a new rule on habeas corpus and should, to that extent, be disapproved. See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990) (overruling precedent is "new rule"). If it does not, then it must be reconciled with *Ramos*.

Stringer and *Ramos* cannot be distinguished on the ground that "future dangerousness" is somehow less vague than "especially heinous." As noted earlier, both factors ask the sentencer to place the crime or criminal on a continuum without objective markings. Furthermore, *Ramos*'s "myriad of factors" discussion and extensive reliance on *Zant* v. *Stephens* preclude any distinction on this basis.

The two cases also cannot be distinguished on the ground of "weighing" versus "nonweighing." At the time *Ramos* was decided, the California system was *more* of a strict "weighing" process than the Mississippi system. Mississippi juries are told to further consider whether the aggravating circumstances are insufficient to warrant death despite their outweighing the mitigating, *Coleman* v. *State*, 378 So. 2d 640, 646-647 (Miss. 1979), while California juries at the time of *Ramos* were given no such instruction, see *Boyde* v. *California*, 494 U. S. 370, 373, n. 1 (1990) (quoting pre-1986 instruction).

The only distinctions which make a difference, then, are the breadth of factors considered on the aggravating side of the scale and the manner in which those factors are screened. In Mississippi, a statutory list is presented to the jury for unanimous findings of true or false. Only those "found to exist" are permitted to be considered. Miss. Code Ann. § 99-19-101(2)(c) (Supp. 1993). In California, the jurors generally make no findings on the second-stage factors,[5] and they need not agree on them. *People* v. *Cox*, 53 Cal. 3d 618, 692, 809 P. 2d 351, 395 (1991). Indeed, the factor of "circumstances of the crime," see Cal. Penal Code § 190.3(a), is not susceptible to a true or false answer.

This distinction is reinforced by *Stringer*'s description of the evil it sought to avoid: "the risk that the jury will treat the

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5. There is an exception to this general rule for prior crimes. For the benefit of the defendants, each juror must find beyond a reasonable doubt that the defendant committed the prior crime before that juror may consider it. California Jury Instructions, Criminal § 8.87 (5th ed., Supp. 1994).

defendant as more deserving of the death penalty than he might otherwise be by relying on the *existence* of an *illusory* circumstance." *Stringer*, *supra*, 117 L. Ed. 2d, at 382, 112 S. Ct., at 1139 (emphasis added). This creates a possibility of "randomness." *Ibid*. Why is this a risk in Mississippi and not in Georgia or California?

Suppose two defendants, C and D, are tried for similar murders. Both crimes are heinous. In Mississippi, both juries are asked to decide, yes or no, whether the crimes are "especially heinous." With no further guidance, C's jury may say yes and D's may say no, based on differences in the jurors' sensitivity rather than an actual difference in the crimes. The circumstance was "found to exist" in C's case but not D's. C's jury would therefore include heinousness on "death's side of the scale," and D's would be instructed not to. This is "randomness," causing C to be considered "more deserving of the death penalty" than D, for no valid reason.

In Georgia and California, this randomness is absent. Both juries will consider the heinousness of the crime. In Georgia, they do so because the final phase is open to all aggravating circumstances. In California, they do so because heinousness is a "circumstance of the offense." All murders are heinous, and the *degree* of heinousness is a proper consideration among the "myriad of factors" permitted under *Ramos*. There is no illusory circumstance. There is no randomness. Both juries give "weight" to the heinousness in the proportion they believe it deserves.

The difference is "the different role played by aggravating factors." *Stringer*, 117 L. Ed. 2d, at 380, 112 S. Ct., at 1137. In Florida and Mississippi the finding of truth of the eligibility factors is the exclusive gateway to the prosecution's case for penalty, while in Georgia and California the eligibility factors do not play this role.

The *Ramos* principle is as sound today as it was the day *Ramos* was decided. The sentencer is not constitutionally limited to considering those factors which meet the *Godfrey* test of specificity. The sentencer may consider "a myriad of factors," and this is true regardless of whether the sentencer "weighs."

III. California's system is less prone to discrimination than others previously upheld.

Amici supporting the defendants assert vigorously that minimizing the influence of racial prejudice has been an essential component of this Court's death penalty jurisprudence. See Brief for American Civil Liberties Union, et al. as *Amici Curiae* ("ACLU Brief") 11-15. With this statement *amicus* CJLF wholeheartedly agrees. Far from being a reason to accept defendants' position, however, this is a reason to reject it.

The simplest way to "fix" California's system, if this Court should declare it "broken," would be to adopt the Georgia system. Instead of limiting aggravating circumstances to the statutory list, California could open up the penalty phase to any and all aggravating circumstances the jury wishes to consider, and then instruct the jurors to "consider" rather than "weigh."

In *Zant* v. *Stephens*, 462 U. S. 862, 875 (1983), this Court unequivocally rejected the argument that "the mandate of *Furman* is violated by a scheme that permits the jury unbridled discretion" once the eligibility finding has been made. This holding was based in part on Georgia's appellate review procedures. *Id*., at 890. However, the next term the Court made clear that this holding referred only to meaningful appellate review, not necessarily intercase proportionality review. California's system of automatic reconsideration by the trial judge followed by automatic appeal to the state supreme court fulfills this requirement. *Pulley* v. *Harris*, 465 U. S. 37, 52-53 (1984); *id*., at 58-59 (Stevens, J., concurring in part).[6] The question, then, is whether California's minimal structuring of the final sentencing decision is likely to promote racial discrimina-

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6. The death-eligibility determination in California is different from Georgia, but the difference is not of constitutional magnitude. California's "special" circumstances are broader than Georgia's "aggravating" circumstances, but California divides murder into degrees while Georgia does not. Compare Cal. Penal Code §§ 189, 190.2 with *Stephens*, *supra*, 462 U. S., at 871. The division of murder into degrees, by itself, renders half of all California murderers exempt from capital punishment. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tennessee* v. *Middlebrooks*, No. 92-989, at 21.

tion, when considered *relative to* the completely unbridled discretion approved in Georgia.

In answering this question, one must consider not only the Scylla of excessive discretion but also the Charybdis of excessive rigidity. If equality of application were the only criterion for constitutionality of a capital sentencing system, then mandatory sentencing would, at first blush, seem to be the solution. Indeed, in the wake of *Furman* v. *Georgia*, 408 U. S. 238 (1972), California enacted such a statute in the well-founded belief that *Furman* required mandatory sentencing. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 446-448, 556 P. 2d 1101, 1116 (1976) (Clark, J., concurring).

As noted *ante*, at 14, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) rejected mandatory sentencing, partly because it collided with another constitutional principle, but also because a sweeping, mandatory death sentence for all first-degree murderers would not be enforced as written, and would thus be uneven in practice. *Id.*, at 303. A sentencing mandate which is strongly at odds with a basic societal consensus regarding what sentence is appropriate raises the danger of sporadic nullification. This danger, in turn, raises the danger of racial inequality, because people may be less willing to violate their instructions for a defendant or a victim of a different race. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 293, 113 S. Ct. 892, 917 (1993) (Stevens, J., dissenting).

Thus, a statute that precludes consideration of a factor uniformly considered strongly mitigating may discriminate against minority defendants, as majority defendants are more likely to receive the benefit of jury nullification of the statute. Conversely, a statute that precludes consideration of a factor uniformly regarded as strongly aggravating may result in a denial of equal justice to minority victims, since jurors may be less motivated to disobey instructions to achieve justice for such a victim. Regardless of whether this latter type of inequality is a ground for attacking a state's sentencing system, see generally *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), the state certainly has a powerful and wholly legitimate interest in avoiding such inequality.

The competing concerns are best resolved by expressly granting the jury discretion and by directing the jurors to exercise that discretion on the basis of those factors that society as a whole believes to be most pertinent to the decision, both on the aggravating side and the mitigating side.

On the mitigating side, this Court has gone far beyond societal consensus and insisted that the defendant be permitted consideration of any factor he proffers as mitigating. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). As this Court is very much aware, defense lawyers have seized upon the *Lockett* rule to proffer some truly amazing evidence as "mitigating."

> "Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance 'beyond the scope' of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even—astonishingly—evidence that the defendant suffers from chronic 'antisocial personality disorder'—that is, that he is a sociopath. See Pet. for Cert. in *Demouchette* v. *Collins*, O. T. 1992, No. 92-5914, p. 4, cert. denied, 505 U. S. ___ (1992)." *Graham* v. *Collins*, 122 L. Ed. 2d 260, 291, 113 S. Ct. 892, 915 (1993) (Thomas, J., concurring).

One *amicus* in the present case criticizes the variety of arguments prosecutors have made on aggravating circumstances. See Brief for California Appellate Project as *Amicus Curiae* 14-15. These examples pale in comparison to what the defense has done with *Lockett*. However, *Lockett* is now firmly entrenched as precedent, and the question is what breadth will be permitted on the other side.

The boundaries here would seem to be well marked. This Court has permitted both of the extreme positions. It is constitutional to base the final decision on only those narrowly defined aggravating factors used to define the death-eligible class, see *Proffitt* v. *Florida*, 428 U. S. 242, 248 (1976), despite the skewed sentencing profile that may result, see *ante*, at 15-16. Conversely, it is constitutional to give the jury free rein to define its own aggravating circumstances, *Zant* v. *Stephens*, *supra*, 462 U. S., at 875, subject only to the limitation that factors which are

impermissible for reasons other than breadth or vagueness may not be used, see, *e.g.*, *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 318, 112 S. Ct. 1093, 1098 (1992) (First Amendment violation).

While these other systems are within the broad limits of constitutionality, *amicus* submits that the California system, which takes the middle ground between them, is superior to either. California directs the jury's attention precisely where it ought to be.

"What is important at the selection stage is an *individualized* determination on the basis of the character of the individual *and the circumstances of the crime*." *Zant* v. *Stephens*, *supra*, 462 U. S., at 879 (second emphasis added). Without mentioning this unequivocal holding, though they cite the case elsewhere, *amici* ACLU, et al. denounce the California statute for telling the jurors to consider precisely what this Court has said they must consider. See ACLU Brief 15-23.

The other factor deemed important by *Stephens* is the "character of the individual." Although important for individualization, this factor has greater potential for discriminatory application, since it necessarily involves an inquiry into the defendant's entire life, as opposed to the circumstances of a single incident.

For the benefit of the defendant, California places substantial restrictions on bad-character aggravation. Character aggravation is limited to prior forcible or violent crimes and prior felony convictions. Cal. Penal Code § 190.3(b) and (c). This limitation excludes all nonviolent misdemeanors and all felonies for which the defendant was not prosecuted. All crimes of any kind for which the defendant was prosecuted and acquitted are excluded. *Id.*, para. 3; cf. *United States* v. *Boney*, 977 F. 2d 624, 635 (CA DC 1992). Bad character evidence is thus trimmed down, for the benefit of the defendant, to the most pertinent and most reliable kinds of evidence: prior violent crimes because they are most pertinent, and prior felony convictions because they are both pertinent and reliable.[7]

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7. The state can, of course, offer broader "bad character" evidence in rebuttal if defendant chooses to open the door with general "good character" evidence. See *Dawson*, *supra*, 117 L. Ed. 2d, at 318-319, 112 S. Ct., at 1098-1099; cf. Fed. Rule Evid. 404(a)(1).

By trimming down the aggravating circumstances, but not attempting a specific, *Godfrey*-qualified enumeration, California directs the jury to the essential factors of circumstances of the offense and character of the defendant. It avoids both the enormous breadth of Georgia's unlimited aggravation and the artificial skewing of Florida's limitation to eligibility factors.

Amici ACLU, et al. contend that "allowing California capital jurors to weigh any and all 'circumstances of the crime' they subjectively find to be aggravating without limitation or guidance results in those jurors exercising the unlimited discretion condemned in *Furman*." ACLU Brief 18. But "circumstances *of the crime*" is substantially greater guidance than is given in the approved Georgia system. It focuses the jury on the crime and not on a generalized disapproval of the defendant, his lifestyle, or the people he has associated with.

The ACLU cites no empirical evidence for the proposition that California's system is more prone to racial discrimination than the Georgia or Florida systems. CJLF has located only one published study on the penalty phase of California capital sentencing, and it points in the opposite direction.

Stephen Klein and John Rolph of the Rand Corporation analyzed the case characteristics of 496 death-eligible homicides. Using a computer "classification tree" program, they identified the factors that actually make a difference, in a statistically significant manner, in the sentencing decision. Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 39-41 (1991). Adding race to the mix, either the defendant's or the victim's, did not improve the predictability to any significant degree. *Id.*, at 43.

> "There was no evidence in our California database to indicate that the death penalty is imposed in an arbitrary or racially discriminatory manner. Receiving this penalty in our sample was moderately predictable due to its relationship to a combination of offender, victim, and crime characteristics. After accounting for some of the many factors that may influence penalty decisions, neither race of defendant nor

> race of victim appreciably improved prediction of who was sentenced to death and who received [life without possibility of parole]. In short, the empirical evidence is consistent with the principle that race of victim should not play a role in sentencing decisions." *Id.*, at 44.

This study has been published, and thus subject to peer review, for over three years. See *Daubert* v. *Merrell Dow Pharmaceuticals*, 125 L. Ed. 2d 469, 483, 113 S. Ct. 2786, 2797 (1993) (importance of publication and peer review). After checking the citation indices available at the date of this writing, *amicus* CJLF has found no published criticisms of the study, a remarkable silence for an article whose conclusion is anathema to the political orthodoxy of academia.

There is no perfect system for deciding which defendants will pay the full price for their crime and which will be granted mercy. *Lockett*, *supra*, 438 U. S., at 605. But neither Georgia's wide-open aggravation rule nor Florida's artificially limited list is an improvement over California's moderate approach. Neither is likely to do a better job of minimizing the impact of racial prejudice. The California compromise is constitutional.

IV. Striking down California's law now would contribute to the very evil *Furman* was intended to correct.

At some point, the constitutionality of a state's basic capital sentencing structure should be finally settled. The list of circumstances under attack here has been the law of California for 17 years. See *Pulley* v. *Harris*, 465 U. S. 37, 52, n. 14 (1984) (quoting 1977 statute).[8] California's system has been to this Court for review four times during those years, *Harris*, *supra*; *California* v. *Ramos*, 463 U. S. 992 (1983); *California* v. *Brown*, 479 U. S. 538 (1987); *Boyde* v. *California*, 494 U. S. 370 (1990), and been upheld every time. Enough is enough.

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8. The only factor added by the 1978 initiative was the crystal clear factor of prior conviction of a felony. Compare *ibid.* with Cal. Penal Code § 190.3(c).

The time for "discovering" fundamental defects not previously seen is long since past.

The course of this Court's capital sentencing jurisprudence has not been smooth for either supporters or opponents of capital punishment. Each side can point to decisions it believes are deeply, fundamentally wrong.

Yet the states which have capital punishment have accommodated the twists and turns, however much they may disagree with them. In the wake of *Woodson*, mandatory sentencing laws were repealed, even for life inmates otherwise exempt from any judicial punishment. See *Sumner* v. *Shuman*, 483 U. S. 66, 72, n. 2 (1987). The *Lockett* rule was accommodated by strained constructions of statutes. See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (*per curiam*); *People* v. *Brown*, *supra*, 40 Cal. 3d, at 541, 709 P. 2d, at 456. The Texas Legislature acted promptly to accommodate *Penry* v. *Lynaugh*'s disapproval of its previously approved system. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 288, n. 9, 113 S. Ct. 892, 913, n. 9 (1993) (Thomas, J., concurring).

However, California has not acted to strip the jury of its authorization to "consider a myriad of factors to determine whether death is the appropriate punishment" for a defendant previously determined to be in the eligible class. See *Ramos*, *supra*, 463 U. S., at 1008. It did not for the clear and simple reason that this Court declared unequivocally that this practice "presents no constitutional problem." *Id.*, at 1008, n. 22.

Hundreds of capital cases have been tried and appealed since then. See U. S. Bureau of Justice Statistics, Capital Punishment 1991, p. 15. The cost has been enormous, not only in dollars but in the anxiety of the victims' families waiting for the creaking judicial machine to finally deliver justice.

To rule for the defendants in this case, this Court would have to either overrule *Ramos* outright or give it such a cramped and narrow interpretation as to raise grave doubt whether anyone can rely on this Court's precedents. An evasion of the plain meaning of the "myriad of factors" holding of *Ramos* would mean "that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that

the law knows no fixed principles." See *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (Jackson, J., concurring in the judgment).

There is no ground for overruling *Ramos*. No new insights have rendered it obsolete. The rule is not "unworkable"; it is not "a remnant of abandoned doctrine"; no facts have changed. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808-2809 (1992) (lead opinion). The rule most definitely is, however, "subject to a kind of reliance that would lend a special hardship to the consequences of overruling . . . ." *Ibid.*, 112 S. Ct., at 2808.

An "annually improvised" jurisprudence in the area of capital sentencing procedure is intolerable. See *Morgan* v. *Illinois*, 119 L. Ed. 2d 492, 517, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting). In such an environment, the only defendants executed would be those the state could push through the system in the "window" period between one revision and the next. Chosen by timing as much as by culpability, they would be "a capriciously selected random handful." See *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (opinion of Stewart, J.)

If executions are to be consistent and not capricious, if this Court is not to cause the very evil it set out to cure, states must be able to rely on a stable body of law. Approval of a practice must neither be rescinded at whim nor construed so narrowly as to render it meaningless.

To rule for the state in this case does require either narrow interpretation or partial disapproval of some surplus language in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The *stare decisis* concerns there, however, are quite different. First, there is no reliance interest whatever. No competent lawyer would try a death penalty case in reliance on an expectation that the statute will be struck down. Second, as a "new and unexpected decision,"[9] *Stringer* has not "become 'part of the tissue of the law.' " See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 124 L. Ed. 2d 472, 516, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part). Third, *Stringer*'s second,

9. Even a pro-defense commentator who applauds the result refers to *Stringer* as a "shocker." Metzner, Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity, 28 Crim. L. Bull. 521 (1992).

alternative holding is the only one at issue here, see *ante*, at 18, and its "vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in the case." *Ibid.*, 113 S. Ct., at 2247.

If *Stringer* cannot be limited so as to preserve *Ramos* intact, then it "presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow . . . ." *Id.*, 124 L. Ed. 2d, at 517, 113 S. Ct., at 2248.

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

Ramos is that prior doctrine. In part II E, *ante*, at 18-20, *amicus* has suggested a way to reconcile *Stringer* with *Ramos* and with California's sentencing system. However, should this Court decide the cases cannot be reconciled, *Stringer* should be disapproved to the extent it is inconsistent with *Ramos*.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

February, 1994

Respectfully submitted,

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APPENDIX

Zant v. *Stephens*, 456 U. S. 410, 412, n. 1 (1982):

Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. *You are further authorized to consider all facts and circumstances presented in extinuation [sic], mitigation and aggravation of punishment* as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized *the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances* which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment

at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case.